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Federal Communications Commission  
Washington, DC

JAN 18 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. <u>93-107</u>
DAVID A. RINGER	)	File No. BPH-911230MA
ASF BROADCASTING CORP.	)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
SHELLEE F. DAVIS	)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES	)	File No. BPH-911231MC

For Construction Permit for an  
FM Station on Channel 280A in  
Westerville, OH

To: The Review Board

**OPPOSITION TO SUPPLEMENT TO REPLY BRIEF**

Shellee F. Davis ("Davis"), by her attorney, hereby submits its Opposition to the "Supplement to Reply Brief" filed by Wilburn Industries, Inc. ("WII"). WII's Supplement contains extra-record information which is not before the Board, and which therefore is not properly considered.

***"Footnote 4"***

WII seeks to clarify "footnote 4" of its Reply Brief by explaining that although the matter WII accused Davis of raising on an untimely basis was, in fact, "raised" previously, Davis' analysis (provided in Davis' "Consolidated Brief in Support of Initial Decision and Contingent Exceptions of Shellee F. Davis" at 7 ¶ 8) should not be considered by the Board.

First and most importantly, the document (namely Bernard Wilburn's financial statement)

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is in the record of this proceeding as Attachment 4 of Davis' original "Motion to Enlarge the Issues Against Wilburn Industries, Inc." (filed on August 19, 1993). The document speaks for itself, and regardless of the presentation of any "argument" by Davis, the document undeniably shows (as WII concedes) that Bernard Wilburn did not, as of January 31, 1992, himself have the necessary \$75,000 in net liquid assets necessary to back up the Certification in the WII application. Significantly, "striking" Davis' argument, as WII requests, will not remove that fact from the record.

Moreover, as Davis noted previously ("Opposition to Motion to Strike" dated January 6, 1994), the argument was, in fact previously raised in this proceeding. Davis filed a "Motion to Enlarge the Issues Against Wilburn Industries, Inc." on August 19, 1993, and WII responded on September 3, 1993, arguing, in part, that Bernard and Charles Wilburn's financial statements show that "Wilburn's principals had the financial wherewithal to meet all of the costs to be incurred" by WII, and that . WII Opposition at 7. To that argument, Davis responded:

review of Bernard Wilburn's financial statement reveals why review is necessary -- even though Bernard Wilburn has pledged to supply \$75,000 in funds, the Statement of Financial Position shows that he possessed only \$39,000 in liquid funds as of January 31, 1992.

Davis Reply (September 16, 1993) at 5. Davis' reply was entirely procedurally proper, and in light of the two-stage process applicable to the filing of Exceptions before the Board, Davis necessarily and properly was free (and obligated) to raise the matter again in her Exceptions. Davis therefore did not "rais[e] the argument for the first time in her Exceptions" (Supplement at 2), and the argument should not be stricken.

**"Footnote 5"**

WII also concedes that "footnote 5" of its "Reply Brief" also was not accurate, but defends its assertion that Davis' argument is "remarkable" for another reason, and quotes various deposition testimony.<sup>1</sup> That deposition testimony cannot even be considered, however, because the deposition testimony is not part of the record of this proceeding.<sup>2</sup> For this reason, as well,

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<sup>1</sup> Curiously, the claim that WII made initially in its Reply Brief, namely that "Davis's argument also is remarkable, because she herself relied on Fry's letter when she initially certified that she was financially qualified" itself was an argument never made below by WII. In fact, the argument is directly contrary to Footnote Two of Davis' original Motion, whereby Davis clearly stated:

In contrast, although Davis is proposing to use the Mid-Ohio equipment, she has prepared a "worst case" budget which allows funds sufficient to purchase replacement equipment for the Mid-Ohio equipment, in the event the Mid-Ohio equipment becomes unavailable prior to the execution of a lease between Davis and Mid-Ohio, along with a \$50,000+ financial cushion.

"Motion to Enlarge the Issues Against Wilburn Industries, Inc." at 8 n.2. Thus, utilizing the reasoning contained in Footnote 4 of WII's "Reply Brief," WII's Footnote 5 should *itself* be "stricken."

<sup>2</sup> Section 1.203 states in relevant part:

The transcript of testimony and exhibits, together with all paper and requests filed in the proceeding, shall constitute the exclusive record for decision.

47 C.F.R. § 1.203. More pragmatically, the fact that Davis herself personally anticipates that the equipment may in fact be available in the future does not itself convey a "reasonable assurance" of the availability of the equipment, especially where, as here, the owner of the equipment's own agent specifically stated in a letter only that it is committing to provide "some or *perhaps* all" of the equipment, and specifically has told Davis' agent:

In regard to the personal property, Mid-Ohio provided no assurance concerning what itemized equipment in the inventory accompanying the correspondence would be available to the successful applicant.

WII's Supplement should be rejected.

WII's Supplement is untimely, and attempts to introduce new facts and new arguments into this proceeding by relying on extra-record information. For these reasons, it should not be accepted.

WHEREFORE, it is respectfully requested that the "Supplement to Reply Brief" be rejected.

Respectfully requested,

SHELLEE F. DAVIS

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January 18, 1994

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Davis' Reply to WII Opposition at Attachment 4. It is well settled that an applicant cannot blithely ignore information withholding or revoking "reasonable assurance" simply based upon applicants' personal "beliefs" that land, funding or equipment will become available in the future. Thus, no assurances have been provided by Mid-Ohio concerning the availability of all of the equipment which in any way rises to the level of a requisite "reasonable assurance."

**CERTIFICATE OF SERVICE**

I, Dan J. Alpert, hereby certify that foregoing document was served on January 16, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:


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